Supreme Court, U.S.
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91-2026

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRUEHAUF CORPORATION
Petitioner,
v.
BERNARD E. HUDDY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Once again, a court of appeals has failed to follow the rule of *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), as repeated in *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975), and has substituted its own preferred or accustomed choice-of-law test to a diversity jurisdiction case, instead of applying the forum's choice-of-law rule. Although the "form" of complying with *Klaxon v. Stentor* was preserved, the substance was not, thereby doing violence to the spirit of federalism. The Petitioner comes to this Court seeking a Writ to the Fifth Circuit Court of Appeals as to the following questions:

1. Whether the Fifth Circuit Court of Appeals' application of a federal "weighing of contacts" test, instead of the Texas choice-of-law rule, in this diversity products liability case, violated this Court's holding in *Klaxon v. Stentor, supra*, and *Day & Zimmermann v. Challoner, supra*.

2. Whether the district court's determination, after proper application of the Texas' choice-of-law rule, that Michigan law should apply to this case, should have been affirmed by the Fifth Circuit Court of Appeals.

3. Whether the Respondent, Bernard E. Huddy, waived his right to raise the choice-of-law issue on appeal.

LIST OF ALL PARTIES

All parties to the appeal below are named in the caption. Terex Corporation is the parent company of Petitioner Fruehauf Corporation.*

Wausau Insurance Company was the Intervenor at the district court level. However, Wausau Insurance Company filed no Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit, did not participate in the appeal, and accordingly should not be considered a party to the case before this Court.

Dow Chemical Company was originally a Third-Party Defendant at the district court level, but was dismissed with prejudice prior to trial and is no longer a party to the lawsuit.

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* During the pendency of this litigation, Fruehauf Corporation has undergone extensive reorganization and was purchased by Terex Corporation. Its correct legal name at this time is Fruehauf Trailer Corporation. However, for the sake of simplicity, Petitioner has not insisted on an amendment of pleadings to reflect the name change. Petitioner will be referred to in the Petition as "Fruehauf Corporation."

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IN THE

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FRUEHAUF CORPORATION,
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 953 F.2d 955 and is set forth in Appendix A. The Order denying the Petition for Rehearing is unreported, and is set forth in Appendix B. The Southern District of Texas Final Judgment entered on the jury verdict is unpublished and is set forth in Appendix C. The choice-of-law ruling by the United States Magistrate Judge for the Southern District of Texas, dated January 25, 1991, is also unreported, but is set forth in Appendix D.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on February 18, 1992, and a Petition for Rehearing was denied on March 18, 1992 (App. A and B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a diversity choice-of-law case. After a jury trial, under Michigan negligence law, Plaintiff Bernard Huddy appealed the federal district court's determination that Michigan was the state with the "most significant relationship" to his defective design cause of action against Fruehauf Corporation. The United States Court of Appeals for the Fifth Circuit, reviewing the choice-of-law issue *de novo*, ruled that Texas law should apply to the case and remanded for a new trial under Texas strict product liability. Petitioner seeks a Writ of Certiorari that the Court of Appeals failed to apply the proper Texas choice-of-law rule, as required by *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941) and *Day & Zimmermann v. Challoner*, 423 U.S. 3 (1975). There is no dispute among the parties, and the Fifth Circuit Court of Appeals acknowledged, that there is in fact a conflict between the law of Texas and the law of Michigan as to theories of recovery for defective design and that a choice of applicable law had to be made by the court. Specifically, Michigan affords only a negligence cause of action for design defect, while Texas permits both a negligence and a strict liability cause of action for product design defect. It is further undisputed and acknowledged by all parties that Texas, the forum state, has

adopted the RESTATEMENT (SECOND) OF CONFLICT OF LAWS "most significant relationship" rule as enunciated in Sections 6 and 145 of the RESTATEMENT.[1]

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1. §6 Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

§145 The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984); *Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex. 1979).

Underlying Facts of the Case:

Plaintiff Bernard E. Huddy sued Fruehauf Corporation, the manufacturer of a chemical tanker-trailer, for personal injuries which Mr. Huddy received when the rig he was driving overturned on Interstate Highway 85 in a one-vehicle accident in Georgia on July 31, 1984. At the time of the accident in Georgia, Mr. Huddy resided in Houston, Texas. He was an employee of Highway Transport Corporation, a Tennessee company with its principal place of business in Knoxville, Tennessee. The entire rig which Mr. Huddy was driving at the time of his accident, consisting of a Kenworth truck and the Fruehauf chemical tanker-trailer, was owned by Highway Transport Corporation. Highway Transport Corporation operates in the forty-eight contiguous United States and has terminals in eight states. Mr. Huddy's trip originated at the Dow Chemical Company plant in Freeport, Texas, where Dow Chemical Company employees filled the chemical tanker with 3,840 gallons of Versene 100, a non-flammable chemical compound. The product was to be delivered to another Dow Chemical facility in Atlanta, Georgia, two days later. Late on the evening of July 31 or early on August 1, 1984, Mr. Huddy's rig left the

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(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative important with respect to the particular issue.

paved portion of Interstate 85, approximately ten miles south of LaGrange, Georgia, and overturned on the grass adjacent to the roadway.

The Fruehauf chemical tanker was manufactured in Pennsylvania. It entered the stream of commerce upon delivery in Tennessee to the purchaser, Highway Transport Corporation.

Course of Proceedings Below:

Bernard Huddy filed suit in September 1985, in the federal district court for the Southern District of Texas against Fruehauf Corporation, alleging strict liability for defective design of the tanker-trailer involved in his accident. Early in 1989, the plaintiff amended his Complaint to include allegations of negligence in design and gross negligence on the part of the Defendant Fruehauf Corporation. Also in 1989, Bernard Huddy and his family returned to their native State of New Jersey. In August 1990, Defendant Fruehauf Corporation filed a motion to determine that Michigan law applied to the case, as the state with the "most significant relationship" under Texas choice-of-law rules (Appendix E). Mr. Huddy opposed the motion and filed a counter-motion to determine that the law of the State of Texas should apply to his case. On December 1, 1990, the lawsuit was referred to a United States Magistrate Judge for all proceedings. On January 25, 1991, after an oral hearing conducted on the pending choice-of-law motions, the Magistrate Judge entered an Order granting Fruehauf Corporation's motion and determining that the law of Michigan was the law applicable to trial of this case, pursuant to Texas' "most significant relationship" rule (Appendix D). The Magistrate Judge granted Bernard Huddy leave to amend his Complaint, in order to plead his negligence allegations more fully under Michigan law. The case proceeded to trial and was

submitted to the jury on interrogatories based solely on a negligence theory of liability under Michigan law. On May 17, 1991, the jury rendered a verdict favorable to the defendant, finding that Fruehauf Corporation had not been negligent in its design of the chemical tanker-trailer. Judgment was entered on the jury verdict (Appendix C). Plaintiff Bernard Huddy appealed the choice-of-law determination to the Fifth Circuit Court of Appeals.

It is undisputed between the parties that the final Pretrial Order filed on April 30, 1991, made no mention of the choice-of-law issue and did not list that issue as a contested issue of law. It was stipulated on appeal that the plaintiff made no proffer of a proposed charge under Texas law and made no objection to the charge or submission of the case to the jury under Michigan law at trial (Stipulation, Appendix F).

Defendant Fruehauf Corporation contended before the United States Court of Appeals for the Fifth Circuit that (1) the plaintiff had waived his right to raise the choice-of-law issue on appeal by failure to preserve the issue in the Pretrial Order, to submit a proposed charge under Texas law, or object to the charge under Michigan law; and (2) the United States Magistrate Judge had correctly determined that Texas would apply Michigan law as the state having the "most significant relationship" to the issue of defendant's liability for defective design.

The Fifth Circuit acknowledged the rule of *Klaxon v. Stentor, supra*, and Texas' adoption of the RESTATEMENT (SECOND) CONFLICT OF LAWS' "most significant relationship" test. However, the Fifth Circuit then proceeded, overtly and expressly, to apply a federal choice-of-law rule ("weighing of contacts") such as is used in

federal maritime cases, rather than the RESTATEMENT (SECOND) §6 principles, including the requisite policy analysis, as dictated by the Texas choice-of-law rule.

The Fifth Circuit declined, both in its original *per curiam* Opinion and in the Order denying the Petition for Rehearing, to address the waiver issue.

Fruehauf Corporation's Petition for Rehearing called to the attention of the court of appeals that it had failed to make the proper analysis under RESTATEMENT §6. Fruehauf's petition for Rehearing was denied, other than limiting the remand to the district court for a new trial under a theory of strict product liability.

REASONS FOR GRANTING THE WRIT

The primary basis for granting Petitioner's Writ in this case is that the court of appeals' use of a "contacts weighing" test instead of the RESTATEMENT (SECOND) §§ 6 and 145 analysis adopted by Texas is in direct contravention of the dictates of *Klaxon v. Stentor, supra,* and *Day & Zimmermann, Inc. v. Challoner, supra.* Accordingly, this case meets the criteria of Supreme Court Rule 10.1(c), in that the court of appeals has decided a federal question (the appropriate choice-of-law rule to be applied by a federal court sitting in diversity) in conflict with the applicable decisions of this Court. Further, such failure by the court of appeals to follow established rules of law constitutes a departure from the accepted and usual course of judicial proceedings, within the meaning of Supreme Court Rule 10.1(a) so as to call for an exercise of this Court's power of supervision.

In this highly people-mobile and product-mobile society, choice-of-law issues have become of increasing importance. The trend is away from rigid rules such as "*lex loci*" and toward more flexible approaches. The RESTATEMENT's "most significant relationship" test is becoming the most commonly adopted approach of the various states. 2 Louis R. Frumer, Melvin I. Friedman, & Cary Stewart Sklaren, PRODUCTS LIABILITY § 11.02 (1992). It is important that there be consistency and predictability in the methodology of applying this two-step analysis in the federal courts. Such consistency in application of the "most significant relationship" test would ultimately result in a reduction of the number of appeals based on diversity choice-of-law issues.

Alternatively, in the interest of promoting judicial economy and affording the trial court ample opportunity to reconsider any issues which the litigants still dispute and precluding the trial court from being lulled into thinking that a litigant has abandoned a previously held position, this Court should grant the Writ on Petitioner's waiver issue and find that Bernard Huddy waived his right to raise the choice-of-law issue on appeal by virtue of not including the issue in the final Pretrial Order, not submitting a proposed charge under Texas law, and not objecting to the charge at the time of its submission to the jury as required by Federal Rule of Civil Procedure 51(a).

The *Klaxon v. Stentor/Day & Zimmermann* Issue

While the court of appeals cited the rule in *Klaxon v. Stentor, supra*, and further recognized that Texas has adopted the RESTATEMENT (SECOND) "most significant relationship" test, the court of appeals, in fact, overtly and expressly applied a *different* test in its *de novo* review of the choice-of-law determination. Specifically, it is clear from a

careful reading of the court of appeals' Opinion that the Fifth Circuit applied a "weighing of contacts" test. This, no doubt, is the choice-of-law test with which the court is most familiar, in that it is the rule applied in cases based on federal law. See, for example, *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970); *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1161-1162 (5th Cir.), *cert. denied* 484 U.S. 977 (1987); *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1275 (5th Cir. 1983), *overruled on other grounds, In re Air Crash Disaster near New Orleans*, 821 F.2d 1147 (5th Cir. 1987). It is similar to a "grouping of contacts" or "center of gravity" approach, which is an entirely different choice-of-law methodology from the "most significant relationship" test.

After noting that, "this case is difficult to resolve under the 'most significant relationship' analysis of the RESTATEMENT" (953 F.2d at 957), the Fifth Circuit stated that the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 "sets out four factors to be considered in determining which state has the most significant relationship to the issue: the place where the injury occurred; the place where the conduct causing the injury occurred; domicil, residence, place of incorporation or place of business of the parties; and the place where the relationship between the parties is centered." *Id.* In fact, however, § 145 states that the state with the most significant relationship is to be determined under the principles stated in § 6 ... taking into account the *contacts* identified in § 145(2). That is, the RESTATEMENT's analysis consists of a two-step procedure. First, the court must identify the states with relevant contacts, and second, decide which of those states has the most significant relationship by analyzing the § 6 principles. *Duncan v. Cessna Aircraft Co., supra* at 421 ("The beginning point for evaluating these contacts is the identification of the policies or 'governmental interests,' if

any, of each state in the application of its rule."). The Fifth Circuit Opinion makes no reference whatsoever to § 6 of the RESTATEMENT; that is, the Court of Appeals failed to engage in the second step of the analysis. The Fifth Circuit simply identified the states with § 145 contacts and then proceeded to "weigh" those states' interests. For instance, the Fifth Circuit noted that the place of injury was Georgia, which was fortuitous, and Georgia had no other "interest" in this case. 953 F.2d at 957. In actuality, while Georgia had a *contact* with this case, it was accepted by both parties that Georgia in fact had *no interest* whatsoever in this case.

After identifying the states with relevant contacts pursuant to § 145, the court of appeals stated that neither Texas' nor Michigan's contact is clearly more significant (953 F.2d at 958), and admitted, again without referring to § 6 of the RESTATEMENT, that it must look to the strength of the underlying state policies. At this point, the court of appeals merely stated that Texas had a strong commitment to protect its residents from defective and dangerous products and that Michigan had an opposing policy of protecting its resident manufacturers and designers from excessive liabilities. However, after identifying the conflicting policies, which was tantamount to little more than the original determination that there was a conflict between the law of Michigan and the law of Texas, the court of appeals simply stated that, "Texas courts have accorded little *weight* to the manufacturer's place of business in this context .... and [T]he mere fact that Fruehauf's corporate offices are located in a state which does not recognize strict liability does not *outweigh* Texas' interest in protecting its residents." *Id.* (emphasis added). At no point did the court of appeals make any attempt to analyze the relative interests of Texas and Michigan in determining Fruehauf Corporation's liability for defective design, as required by § 6(2)(c). The court of appeals did not even consider the well-articulated strength of

Michigan's policy, requiring a plaintiff to prove fault or negligence in defective design cases. *See, Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176, 186 (Mich. 1984). Further, the court of appeals did not consider the other § 6 principles: (a) the needs of the interstate system, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result. However, each of these principles had been addressed in Fruehauf's motion and considered by the district court in making its choice-of-law determination, as well as discussed in Fruehauf's brief on appeal.

The court of appeals' statement that *because* neither state's contact is clearly more significant, it had to look to the strength of the state policies underlying the conflict, appears to put the proverbial cart before the horse. The RESTATEMENT test adopted as the Texas choice-of-law rule requires (1) identification of the § 145 "contact" states, and then (2) application of the § 6 principles and policy evaluation, *in order to* determine which state has the most significant relationship. The court of appeals indicated it needed to look at the underlying state policies only because its "contact weighing" process did not provide an obvious answer to the choice-of-law question. This is *not* the Texas rule.

Since the court of appeals did not apply the appropriate Texas choice-of-law test, it violated the rule of *Klaxon v. Stentor*, and *Day & Zimmermann v. Challoner*.

Application of the Proper Choice-of-Law Test Indicates Texas Courts Would Apply Michigan Law to This Case

The district court, pursuant to *Klaxon v. Stentor, supra*, and Texas' adoption of the RESTATEMENT (SECOND) "most significant relationship" test, correctly applied the § 6 principles to the states identified with relevant contacts under § 145 and determined that Michigan was the state with the most significant relationship to the issue of Fruehauf Corporation's liability to the plaintiff for defective design. The relevant Texas cases reveal that Texas courts have engaged in the RESTATEMENT (SECOND) policy analysis and application of the § 6 principles which form the basis for the RESTATEMENT (SECOND) test. The Texas courts, in following *Gutierrez v. Collins, supra*, have acknowledged that application of the RESTATEMENT's "most significant relationship" analysis does not turn on the number of contacts with one state, but more importantly on the qualitative nature of those contacts as affected by the policy factors set out in § 6 of the RESTATEMENT. *Gutierrez v. Collins, supra.* Texas courts have in fact engaged in this analysis of § 6 principles in making the choice-of-law determination. *See, Crisman v. Cooper Industries*, 748 S.W.2d 273 (Tex.App. -- Dallas 1988, writ denied); *American Home Assurance v. Safway Steel Products Co.*, 743 S.W.2d 693 (Tex.App.--Austin 1987, writ denied). Further, federal courts sitting in diversity and applying Texas choice-of-law rules have recognized the need to apply the § 6 principles to those states having relevant contacts under § 145 in order to make the choice-of-law determination. *See, Baird v. Bell Helicopter Textron*, 491 F.Supp. 1129, 1138 (N.D. Tex. 1980). The *Baird* court carefully analyzed the policies underlying each relevant jurisdiction's policies and the legitimate interest each jurisdiction had in applying those policies to the facts of that particular case. *Id.* 1140-1153.

In making the original choice-of-law determination, the district court had before it for consideration the motions of both parties, which set forth the full analysis of the choice-of-law question according to the RESTATEMENT § 6 principles as applied to the interested states identified by § 145, including the underlying policies of both the Texas tort rules and the Michigan tort rules applicable to this case. (See Fruehauf Corporation's Motion to Determine Choice of Law, Appendix E.) These same policy arguments and the relative interests of Texas and Michigan in having their law applied to the facts of this case were also fully presented to the court at the oral hearing on January 17, 1991, prior to the decision by the district court. Based on this application of § 6 principles and policy analysis, the district court determined that Texas courts would apply Michigan law to determine Fruehauf Corporation's liability to the plaintiff for defective design of the tanker-trailer in question. Application of Michigan law, which affords the plaintiff a cause of action for negligent design against the trailer manufacturer, gave effect to Michigan's strongly held policy of protecting its resident product manufacturers from excessive liability to injured plaintiffs, while still affording a remedy to Mr. Huddy, including basically the same elements of damages as Texas law, other than limited exemplary damages. On the other hand, application of Texas law to this case would totally frustrate the Michigan policy of protecting its resident manufacturers from strict liability. It is generally understood that a state's primary interest in affording remedies to its injured residents is to prevent the injured resident from becoming a ward of the state or a drain on state resources. *Baird v. Bell Helicopter Textron, supra* at 1145 (applying Texas law). Application of Texas law was not necessary in order to achieve this goal, since Michigan law afforded Mr. Huddy a remedy in negligence. To the extent that Mr. Huddy was not a resident of the State of Texas at the time the choice-of-law motion was under

consideration and at the time of trial, Texas' interest in ensuring he did not become a drain on state resources was further attenuated. It is conceded that Mr. Huddy was a resident of the State of Texas at the time of the accident and at the time his lawsuit was filed. However, while the residency of the plaintiff in the forum state may be a significant factor, it is not dispositive. The Texas cases clearly show that Texas courts require something more than the fact of the plaintiff's residence in the forum in order to justify the application of Texas law to the case. *See e.g., Moorhead v. Mitsubishi Aircraft International, Inc.*, 639 F.Supp. 385, 391 (E.D.Tex.), aff'd in part, rev'd in part, 828 F.2d 278 (5th Cir. 1987); *Baird v. Bell Helicopter Textron, supra; Crisman v. Cooper Industries, Inc., supra*; *Duncan v. Cessna Aircraft Co., supra.*

The Fifth Circuit itself has acknowledged that a state's interest in a resident plaintiff's unpaid medical bills and loss of earning power is not more compelling or substantial than another state's strong interest in limiting a manufacturer's exposure to products liabilities actions. *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 144 (5th Cir. 1991). While a state may be especially concerned with the protection of its injured domiciliaries, this factor is not controlling. If so, a state would have a different choice-of-law rule than "the most significant relationship" rule. *Id.* It has been acknowledged that Texas' interest in the regulation of the conduct of manufacturers is strong when the defective product in question was manufactured and placed in the stream of commerce in the State of Texas. *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990), citing *Melton v. Borg-Warner Corp.*, 467 F.Supp. 983, 986 (W.D.Tex. 1979). However, the district court was well aware that the allegedly defectively designed trailer in this case was not designed, manufactured, nor placed in the stream of commerce in the State of Texas. Thus the

legitimacy of Texas' interest in enforcing its strict liability policies against the defendant in this case is highly questionable.

The Waiver Issue

Finally, Petitioner urges that the court of appeals should have found that the principle of judicial economy and the Federal Rules of Civil Procedure required that Bernard E. Huddy in some manner apprise the trial court that he had not, at the time of trial, abandoned his contention that the law of Texas should be applied to this case. This would have afforded the court at least an opportunity to reconsider its position or perhaps even to submit interrogatories to the jury in such a manner that a reversal by the court of appeals on the choice-of-law issue would not necessitate a new trial on the issue of Fruehauf Corporation's liability to the plaintiff. For instance, if the trial court had been aware that Mr. Huddy had not abandoned his contention that Texas law applied to the case, the appropriate Texas strict liability questions could have been submitted to the jury as to whether there was a "defect" in the chemical tanker-trailer and, if so, whether such defect was a producing cause of the Plaintiff's injuries. The trial court could then have rendered judgment *non obstante veredicto* as to any affirmative jury findings in the strict liability issues, based on the trial court's determination that Michigan law applied to the case. Then if the Fifth Circuit, after correctly applying the Texas choice-of-law rule to this case, had concluded Texas law applied to the issue of Fruehauf's liability to the plaintiff, they could simply have reversed and rendered, rather than having to remand for a new trial. By standing mute on the choice-of-law issue from January 17, 1991, until after the case had been tried and submitted to the jury under Michigan law, the plaintiff has manipulated the Federal Rules of Civil Procedure to afford himself "two bites at the apple." The

federal courts should not permit a litigant to (1) fail to include a contested issue of law in the final pretrial order, (2) fail to submit a proposed charge under the law the litigant believes is applicable to the case, *and* (3) fail to object to the charge, and still be permitted to raise the issue on appeal. Accordingly, the plaintiff in this case should be deemed to have abandoned the choice-of-law issue or to have waived his right to raise this issue on appeal.

CONCLUSION

In summary, this Court should grant the petition for writ of certiorari and direct the Fifth Circuit Court of Appeals to affirm the district court's choice-of-law ruling and the judgment which was entered on the jury verdict.

Or, alternatively, Petitioner urges the Court to grant the writ of certiorari and, in the exercise of its supervisory powers under Supreme Court Rule 10.1(a), direct the Fifth Circuit Court of Appeals to enter an order finding that the plaintiff waived his right to raise the choice-of-law issue on appeal.

Respectfully submitted,

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APPENDIX A

OPINION OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Bernard E. HUDDY, Plaintiff-Appellant,
v.
FRUEHAUF CORPORATION,
Defendant-Appellee.

No. 91-2790
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 18, 1992.

Texas truck driver who was injured when truck he was driving overturned on Georgia interstate highway brought products liability action against trailer manufacturer, whose principal place of business was in Michigan, alleging that manufacturer was liable for defective design under both negligence and strict liability theory. The United States District Court for the Southern District of Texas, at Houston, Nancy Pecht, United States Magistrate Judge, ruled that case was governed by Michigan law, which does not recognize strict liability theory of recovery, rather than Texas law, which does. Manufacturer prevailed at trial, and driver appealed. The Court of Appeals held that: (1) fact that driver moved to New Jersey from Texas more than three years after accident was not determinative on choice of law question, and (2) Texas law governed.

Vacated and remanded.

1. Federal Courts 776

Court of Appeals reviews district court's choice of law determination de novo.

2. Federal Courts 409

In diversity case, Court of Appeals looks to law of forum state to determine which state law governs case.

3. Products Liability 3

Texas law, which recognizes strict liability theory of recovery, rather than Michigan law, which does not, governed Texas truck driver's defective design action against manufacturer, whose principal place of business was Michigan; fact that driver moved from Texas more than three years after accident was not determinative, location of wreck in Georgia was fortuitous, and Texas' strong commitment to protecting its residents from defective and dangerous products outweighed considerations of manufacturer's principal place of business, as trailer was not manufactured or placed into stream of commerce in Michigan, and place of design was unknown.

Patrice M. Barron, Robert O'Conor, Jr., Houston, Tex., for B. Huddy.

Marily T. Hebinck, Royston, Rayzor, Vickery & Williams, Houston, Tex., for Fruehauf Corp.

Appeal From the United States District Court for the Southern District of Texas.

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:

The sole issue raised on appeal is whether the magistrate erred in determining that the law of Michigan governed this tort case. Because we find that the magistrate erred in applying Michigan law, we reverse for a new trial under Texas law.

I.

In 1984, appellant Bernard Huddy was injured when the truck he was driving overturned on a Georgia interstate highway. At the time of the accident, Huddy was a Texas resident who was employed as a driver by a Tennessee corporation. The trip during which he was injured began at a Dow Chemical plant in Texas and was scheduled to end in Georgia.

In September 1985, Huddy sued appellee Fruehauf Corporation, the manufacturer of the trailer which overturned, for personal injuries he suffered in the accident. Jurisdiction was based upon diversity of the parties. Fruehauf is a corporation with its principal place of business in Michigan.

Huddy alleged in his complaint that Fruehauf was liable for defective trailer design under both a negligence and a strict liability theory. In 1989, more than three years after the suit was instituted, Huddy moved from Texas to New Jersey. In 1990, Fruehauf moved before the magistrate handling the case for a determination that Michigan law

governs the case. Michigan law does not recognize a strict liability theory of recovery. The magistrate held that Michigan law applied and the case was tried to a jury on only the negligent design theory. Fruehauf prevailed at trial and Huddy timely appealed.

II.

[1,2] We review a district court's choice of law determination de novo. *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 138 (5th Cir. 1991). In a diversity case we look to the law of the forum state to determine which state law governs the case. *Klaxon v. Stentor Electric Manufacturing, Inc.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941); *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 461 (5th Cir. 1991). Texas, the forum state here, has adopted the "most significant relationship" approach to choice of law, as detailed in Restatement (Second) of Conflict of Laws. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

[3] There is no dispute that there is a true conflict between the laws of Michigan and Texas as they relate to the core issue in this case. Texas law allows recovery against manufacturers under a strict liability theory for personal injury while Michigan law requires negligence. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 365 N.W.2d 176 (1984). In fact, of all the states that have even a slight interest in this case, Michigan appears to be the only one which would not recognize Huddy's strict liability theory.[1]

Although we cannot discern conclusively from the record the rationale for the magistrate's determination that

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1. *See Center Chemical Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580 (1975); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 1966).

Michigan law applies to this case, it appears to be based largely on Huddy's 1989 move to New Jersey. Fruehauf argued below and in this court that because Huddy is no longer a Texas resident, Texas has no significant interest in this case. We disagree. Huddy's move more than three years after suit was filed should not be determinative in the choice of law analysis.[2]

Texas has evinced a strong interest in protecting its residents from personal injury caused by defective products. At the time of this accident Huddy was within that protected group. For more than three years after the accident, he remained a Texas resident. He was paid thousands of dollars in workers' compensation payments as a result of this accident while he was still a Texas resident. Texas does not lose its interest in this case because Huddy is no longer a resident. *See American Home Assurance Company v. Safway Steel Products*, 743 S.W.2d 693 (Tex.App.--Austin 1987) (Texas still has interest in case although Texas plaintiffs had already been compensated).

The fact that this question arises at all is testimony to the slow pace of justice in today's courts. More than six years elapsed between the accident and the court's decision regarding the appropriate choice of law. To hold that Texas loses its interest in this case because Huddy chose to move to another state during the litigation process would chain litigants to the state of residence at the time of the accident lest they lose the protection of its laws. Therefore, we will

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2. *See* Restatement (Second) of Conflict of Laws, Introductory Notes to § 145 (indicating that changes in domicile after suit is filed should very seldom affect analysis); *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 601-02 (5th Cir. 1981) (giving weight to fact that plaintiff was Louisiana resident when accident occurred although he moved to Arkansas before suit was filed).

analyze the interests of the various states as they existed before Huddy moved to New Jersey.

Even after we conclude that Texas' interest should be measured before Huddy's move, this case is difficult to resolve under the "most significant relationship" analysis of the Restatement. Restatement (Second) of Conflict of Laws § 145 sets out four factors to be considered in determining which state has the most significant relationship to the issue: the place where the injury occurred; the place where the conduct causing the injury occurred; domicil, residence, place of incorporation or place of business of the parties, and the place where the relationship between the parties is centered.

The injury in this case took place in Georgia. Both parties have indicated that the location of the wreck was fortuitous and that Georgia has no other interest in this case. Therefore, although in most cases the place of injury will be an important factor in determining which law to apply, Georgia's interest in this case does not appear compelling. In any event, Georgia and Texas law both recognize strict liability as asserted by Huddy (*see* note 1, *supra*), which is the point of conflict here.

The place where the conduct causing the injury occurred is uncertain. Fruehauf would have us put much weight on this factor. However, Fruehauf must concede in its brief that where the truck was designed is unknown. Therefore, Fruehauf argues, the place where the harmful conduct occurred is Fruehauf's main office in Michigan where the plan must have been approved. Under Texas law, where as here there is no evidence in the record as to the place of design, this factor is simply to no effect. *Crisman v. Cooper Industries*, 748 S.W.2d 273, 277 (Tex.App. -- Dallas 1988). We are unwilling to accord much weight to

the place of the design's final approval, which amounts to nothing more than double-counting the manufacturer's principal place of business.

Other factors which Texas courts have used to evaluate the place of the conduct causing harm do not help resolve this question. In *Crisman*, the court recognized that even in a design case "mere design or manufacture of a defective product is not actionable." *Id.* Therefore, we should also consider the place of manufacture and the place of entry into the stream of commerce. Unfortunately, the place of manufacture was Pennsylvania, and the truck entered the stream of commerce in Tennessee. Thus, the place of the conduct causing the harm does not help us choose Michigan or Texas law.

The third factor we consider is the domicile, residence or place of business of the parties. As discussed above, Huddy was a Texas resident at all relevant times. Fruehauf is a corporation incorporated in and with its principal place of business in Michigan. The fourth factor, the place where the relationship between the parties is centered has no effect in this case.

We are left then with two states which have a party as a resident. Because neither state's contact with this case is clearly more significant, we must look to the strength of the state policies underlying the conflict. Texas has a strong commitment to protecting its residents from defective and dangerous products. *See Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249 (5th Cir. 1990) ("The Texas legislature and courts have developed an almost paternalistic interest in the protection of consumers."). Michigan has an opposing policy of protecting its resident manufacturers and designers from excessive liability to injured plaintiffs. *Pruitt*, 932 F.2d at 462. Texas courts have accorded little

weight to the manufacturer's place of business in this context. In particular, the Texas courts have not based their choice of law upon the manufacturer's principal place of business where the allegedly defective product was not manufactured, designed, or placed into the stream of commerce in that state. *Crisman*, 748 S.W.2d at 277. The mere fact that Fruehauf's corporate offices are located in a state which does not recognize strict liability does not outweigh Texas's interest in protecting its residents. We conclude that Texas courts would apply Texas law in this case. Accordingly, we VACATE the judgment of the district court and REMAND for a new trial.

APPENDIX B

HUDDY v. FRUEHAUF CORP.

Bernard E. HUDDY, Plaintiff-Appellant,

v.

FRUEHAUF CORPORATION,
Defendant-Appellee.

No. 91-2790

United States Court of Appeals,
Fifth Circuit.

March 18, 1992.

Appeal from the United States District Court for the Southern District of Texas; Nancy Pecht, United States Magistrate Judge.

ON PETITION FOR REHEARING

(Opinion February 18, 1992, 5th Cir., 1992, 953 F.2d 955)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied, except we remand this case for trial of the claim under Texas principles of strict liability, and not for

trial of the claim of negligence. The latter has been tried. There is no suggestion of a conflict between the law of negligence in Michigan and the law of negligence in Texas.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAY 29 1991
Jesse E. Clark, Clerk
By Deputy: [illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BERNARD E. HUDDY	§	
	§	
VS.	§	C.A. NO. H-85-5522
	§	
FRUEHAUF CORPORATION	§	

FINAL JUDGMENT

Based on the jury's Answer(s) to Interrogatories of May 17, 1991, judgment in the above-captioned case is hereby entered in favor of the Defendant Fruehauf Corporation. Costs are awarded to the Defendant.

THIS IS A FINAL JUDGMENT.

SIGNED for entry this 28th day of May, 1991, at Houston, Texas.

/s/
HONORABLE NANCY PECHT
UNITED STATES MAGISTRATE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JAN 28 1991
Jesse E. Clark, Clerk
By Deputy: [illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BERNARD E. HUDDY,	§	
Plaintiff	§	
VS.	§	Civil Action No. H-85-5522
	§	
FRUEHAUF CORPORATION	§	
Defendant	§	
VS.	§	
	§	
THE DOW CHEMICAL	§	
COMPANY,	§	
Third-Party Defendant	§	

ORDER

The Court having considered Defendant Fruehauf Corporation's Motion to Reconsider the Court's order of November 16, 1990, finds that the Motion should be and hereby is GRANTED.

Further, the Court having considered Fruehauf Corporation's Motion to Determine that the law of Michigan is the law applicable to the trial of this case, and Third-Party Defendant Dow Chemical Company's joinder in such motion and Plaintiff's opposition to such motion, finds that the

Motion should be and hereby is GRANTED. This case will be tried and submitted to the jury based on the law of the State of Michigan.

It is further ORDERED that Plaintiff will be permitted to amend his complaint within 14 days of the date of this Order.

SIGNED this 25th day of January, 1991, at Houston, Texas.

/s/
NANCY K. PECHT
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BERNARD E. HUDDY,	§	
Plaintiff	§	
	§	
VS.	§	
	§	
FRUEHAUF CORPORATION	§	C.A. NO. H-85-5522
Defendant and	§	
Third-Party Plaintiff	§	
	§	
VS.	§	
	§	
THE DOW CHEMICAL	§	
COMPANY,	§	
Third-Party Defendant	§	

DEFENDANT FRUEHAUF CORPORATION'S
MOTION FOR DETERMINATION
BY THE COURT AS TO CHOICE OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Fruehauf Corporation and moves this Court to find that the issues of liability and damages in this case, both as to the claims of the Plaintiff against the Defendant and as to the third-party claim of Defendant against Third-Party Defendant Dow Chemical Company, shall be determined according to the law of the State of Michigan, and in support thereof would show as follows:

I.

Undisputed Facts of the Case

This is a personal injury products liability case. The Plaintiff, Bernard E. Huddy, has sued the Defendant Fruehauf Corporation alleging that the tanker-trailer involved in the Plaintiff's accident of July 31, 1984 was defectively designed. Plaintiff is alleging liability of the Defendant both under theories of strict liability for defective design and negligent design. Defendant Fruehauf Corporation claims entitlement to indemnity and/or contribution from Third-Party Defendant Dow Chemical Company on the theory that Dow negligently loaded the tanker-trailer involved in the Plaintiff's accident.

The Plaintiff's accident occurred on July 31, 1984, on Interstate 85 approximately five miles south of LaGrange, Georgia. The Plaintiff was engaged in transporting a cargo of liquid Versene from Dow Chemical Company's plant in Freeport, Texas, to a Dow Chemical Company facility in Atlanta, Georgia. The Plaintiff was employed by highway Transport Company, whose headquarters is in Knoxville, Tennessee. The tractor-trailer rig which the Plaintiff was driving was owned by Highway Transport Company. The tanker-trailer which forms the subject of this lawsuit was manufactured in Pennsylvania under a contract of sale executed in Tennessee. The tractor-trailer was delivered to Highway Transport Company in Tennessee. At the time this lawsuit was filed, the Plaintiff was a resident of the State of Texas; however, since that time the Plaintiff has returned to his home state of New Jersey, where he currently resides. Defendant Fruehauf Corporation's principal place of business is in Detroit, Michigan. Third-Party Defendant Dow Chemical Company's principal place of business is also in Michigan.

The jurisdiction of this Court is premised on diversity of citizenship between the Plaintiff and the Defendant. Accordingly, state law will supply the substantive law to be applied to this case. *Erie Railroad co. v. Tompkins*, 304 U.S. 64 (1938). Defendant Fruehauf Corporation contends that the substantive law applied to this case should be that of the State of Michigan, as opposed to the substantive law of the State of Texas. (Defendant is unaware of any party's contention(s) that the law of any other state is applicable to this case.)

II.

There is a Genuine Conflict Between
the Law of Michigan and the Law of Texas

When a choice of law issue is raised, the Court's first task is to determine whether there is a conflict between the laws of the various jurisdictions having a relationship to this case. In the case at bar, there is a clear and strong conflict between the product liability law of Texas, the forum, and the law of Michigan. Under the law of Michigan, a plaintiff is limited to a cause of action in negligence. Michigan has not adopted the concept of strict liability in tort. *See, Prentis v. Yale Manufacturing Company*, 421 Mich. 670, 365 N.W.2d 176 (1984). Texas, on the other hand, allows a plaintiff to assert both "negligence and strict product liability claims against a manufacturer for personal injuries. *(See, Duncan v. Cessna*, 665 S.W.2d 312 (Tex. 1979).

The significant differences in the plaintiff's proof under a strict liability theory as opposed to a negligence theory of liability are well defined. Under Michigan law, the four elements of a negligence cause of action are (1) that the defendant owed a duty to the plaintiff; (2) that the defendant violated that duty; (3) that the defendant's breach of duty was

a proximate cause of the damages suffered by the plaintiff; and (4) that the plaintiff suffered damages. *Warner v. General Motors Corp.*, 137 Mich. App. 340, 357 N.W.2d 689 (1984). The standard of care applicable to a negligence action is whether the defendant's conduct was reasonable in light of the apparent risk of harm. *Maletich v. Zemaiduk*, 115 Mich. App. 206, 320 N.W.2d 72 (1982). Thus, under a negligence theory of liability, the plaintiff must prove some violation of a duty of reasonable care by the designer/manufacturer of the product. He must also establish that such breach of duty of care was a *proximate* cause of his damages.

Under a strict liability theory, on the other hand, in those states which have adopted Section 402A of the Restatement (Second) of Torts (1965), a plaintiff must merely prove: (1) the product in question was "defective;" (2) the defect existed at the time the product left the hands of the defendant; (3) that because of the defect the product was unreasonably dangerous to the user/plaintiff; (4) that the plaintiff was injured or suffered damages; and (5) that the defect was a *producing* cause of the injury suffered. *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1272 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974). That is, the manufacturer may be held liable, even though he has exercised all reasonable care in the design and manufacture of his product and even though the defect may not have been the proximate cause of the injury suffered. Therefore, there is a substantial difference and a conflict between the product liability law of the States of Texas, which has adopted Section 402A of the Restatement, and of Michigan, which has refused to adopt that Section.

Further, there is a substantial difference in the laws of Texas and Michigan pertaining to an award of punitive or exemplary damages in tort cases. While exemplary damages may be awarded for injury to feelings and for the sense of indignity and humiliation suffered by a plaintiff because of injury maliciously and wantonly inflicted, an award of punitive damages for the purpose of punishing or deterring a defendant is prohibited in Michigan. *Jackovich v. General Adjustment Bureau, Inc.*, 119 Mich. App. 221, 326 N.W.2d 458 (1982). Further, the giving of an instruction on exemplary damages for emotional or mental distress and anguish is error under Michigan law where actual compensatory damages are allowed for these same elements. *King v. General Motors Corp.*, 136 Mich. App. 301, 356 N.W.2d 626 (1984). On the other hand, Texas law views the primary purpose of award of punitive or exemplary damages to be punishment or deterrance of conduct. *Maxey v. Freightliner Corp.*, 722 F.2d 1238 (5th Cir. 1984); *Burke Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981). The difference between these two conflicting policy approaches to an award of exemplary damages would significantly affect the jury award, if any, in the case at bar.

Since there is such a significant conflict between the product liability law of the State of Michigan and that of the State of Texas, the Court must make a choice of law determination in this case.

III.

In a diversity case such as this, the federal district court must look to the forum state's choice-of-law rules in making a choice of law determination. *Klavon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). The choice of law determination is a question of law to be decided by the Court. *Duncan v. Cessna, supra* at 421, citing *Guiterrez*

v. Collins, 583 S.W.2d 312, 319 (Tex. 1979). Texas has adopted the "most significant relationship" rule enunciated in Sections 6 and 145 of the Restatement (Second) of Conflicts. *Guiterrez, supra*, at 318.

Section 6 sets out the general principles by which the more specific rules are to be applied. It states:

Section 6. Choice-of-Law Principles

(1) A Court, subject to constitutional or restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease of the determination and application of the law to be applied.

Section 145 lists the factual matters to be considered when applying the principles of Section 6 to a tort case:

Section 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Section 6.

(2) Contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue."

Further, the application of the "most significant relationship" analysis should not turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6. *Id.* at 319.

Applying the Section 145(2) contacts analysis to the case at bar indicates the following:

(a) *Place where injury occurred:*
Georgia.

(b) *Place where the conduct causing the injury occurred:*

As to Defendant Fruehauf Corporation, regardless of where the actual design function was performed, approval of the tanker design and authorization for the manufacture and offering for sale of tankers according to that design occurred at Fruehauf's headquarters and principal place of business in Detroit, Michigan. Defendant has alleged that Third-Party Defendant Dow Chemical Company negligently loaded the tanker involved in the Plaintiff's accident. The loading of the tanker occurred at Freeport, Texas. However, the evidence at this trial is expected to establish that Dow Chemical Company's policies concerning the loading of chemicals to be shipped from its facilities throughout the United States are made in Michigan, Dow Chemical Company's principal place of business.

(c) *The domicile, residence, nationality, place of incorporation and place of business of the parties:*

The Plaintiff resides in New Jersey; Defendant Fruehauf Corporation is incorporated in and has its principal place of business in Michigan. Third-Party Defendant Dow Chemical Company also has its principal place of business in Michigan.

(d) *The place where the relationship, if any, between the parties is centered:*

This particular contact is of little, if any, importance in this case, since the Plaintiff's lawsuit is based in tort, not in contract and is not based on an on-going relationship between the Plaintiff and the Defendant Fruehauf Corporation. Similarly, there was no on-going relationship between Defendant Fruehauf Corporation and Third-Party Defendant Dow Chemical Company.

The relative weight of the interest of the various states having contact with this case must be determined within the context of the Section 145 principles:

(a) *Needs of the interstate and international systems:*

Due to the increasing mobility in this country, both in its citizens' personal and their employment situations, as is readily demonstrated by the case at bar, the primary needs of the interstate system would appear to be (1) easy access for injured plaintiffs to a court system and (2) some amount of confidence and predictability on the part of the manufacturer as to what state's laws will be applied to him. Both of these needs would be fully met in this case by the application of Michigan law. The Plaintiff herein has been given his choice of forum. The Defendant has not at any time contested jurisdiction or venue of this lawsuit in the federal district court in Houston, Texas. By applying the law of Michigan to Fruehauf Corporation, the product liability Defendant, the predictability and uniformity goals would be met. An additional benefit to the consistent application of the law of the state of the manufacturer would be to diminish the effects of "forum shopping" by injured Plaintiffs.

(b) *Relevant policies of the forum state, Texas:*

Texas has adopted policies focused on providing the maximum amount of recovery possible to injured plaintiffs. However, those policies would not be frustrated or circumvented in this lawsuit, since the Plaintiff is not a resident of the State of Texas and Texas does not run the risk of having to provide welfare or other-type benefits to Mr. Huddy as a result of any injuries he may have sustained in the accident forming the basis of this lawsuit. While a state may have a legitimate interest in the amount of damages paid to its residents, *In re Chicago Air Crash Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981), this is only advanced in actions where there is some possibility of an inadequately compensated individual becoming a ward of that state. *See Baird v. Bell Helicopter Textron*, 491 F.Supp. 1129, 1145 (N.D.Tex. 1980), applying Texas law in a products liability claim (defective design and manufacturer) by Canadian plaintiffs against a Texas manufacturer.

(c) *Relevant policies of other interested states and the relative interests of those states in determination of that issue:*

Any contact between the State of Georgia and this lawsuit was purely fortuitous; the State of Georgia has no interest in the outcome of the lawsuit or any justified interest in having its law apply to this case. Similarly, the fact that the Plaintiff was a resident of the State of Texas at the time he filed his lawsuit should not be given great weight, since he no longer resides within the State of Texas; that is, Texas has little justifiable interest in having its laws and policies applied to the Plaintiff's lawsuit or interest in the outcome of the lawsuit. While the Plaintiff's employer, Highway Transport Corporation (who is not a party to the lawsuit), operated a terminal at La Porte, Texas, from which the

Plaintiff started the trip on which he was injured, Highway Transport Corporation has its principal place of business in Knoxville, Tennessee, and operates throughout the United States. Likewise, although the Plaintiff's tanker was loaded at Dow Chemical Company's Freeport, Texas plant, Dow Chemical Company has its principal place of business in Michigan and operates chemical plants throughout the United States. Further, it is anticipated that the evidence at trial of this case will establish that Dow Chemical Company's policies and instructions pertaining to the interstate shipment of chemicals from its plants and the loading of its products into over-the-road tankers is made in Michigan and disseminated to its plants nationwide from Michigan.

On the other hand, the State of Michigan has a substantial interest in having its policies applied to this product liability lawsuit against one of its resident manufacturers and even in determining the potential liability of another one of its resident corporations, Dow Chemical Company, to the Defendant Fruehauf Corporation. It is clear from the product liability law briefly set forth in Paragraph II above, that the Michigan legislature, in adopting its Product Liability Act, Revised Judicature Act, Section 27A.2945 through Section 27A.2949 in 1978, MCL Section 600.2945- MCL Section 600.2949, deliberately and purposefully gave effect to a policy of providing protection to its resident manufacturers and designers of products from excessive liability to injured plaintiffs. These underlying policies of Michigan product liability law would be totally frustrated and completely undermined if the manufacturers and product designers whose principal places of business were in Michigan were exposed to design defect liability under the laws of every jurisdiction in the country, particularly where the policies underlying the other jurisdictions substantive laws directly conflicted with Michigan law. A state has a legitimate interest in protecting

its corporate defendants, particularly from excessive damages. *In re Air Crash Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 610 (7th Cir. 1981). Thus, in this case, the State of Texas has no interest in the amount of compensation or damages received by the Plaintiff, while the State of Michigan has a significant interest in protecting its resident corporate Defendant, Fruehauf Corporation, from excessive damages. *See Pittway v. Lockheed, A/C Corp.*, 641 F.2d 524 (7th Cir. 1981).

(d) *Protection of justified expectations:*

Application of Michigan law would provide protection to the justified expectations of Defendant Fruehauf Corporation as a Michigan citizen in that it would be both protected by and held to the standards of Michigan product liability law. It is unreasonable to expect a Michigan design defendant to anticipate having Texas tort liability applied against it for an accident occurring in Georgia, injuring a resident of New Jersey, while hauling chemicals in a tanker manufactured in Pennsylvania, sold to the plaintiff's Tennessee employer, and placed in the stream of commerce in Tennessee!

(e) *Basic policies underlying the particular field of law:*

Michigan's product liability law is not so restrictive as to undermine the basic policies underlying the field of tort law. That is, by affording injured plaintiffs negligence causes of action against manufacturers and by allowing even punitive or exemplary damages where needed to further compensate a plaintiff make him whole, adequate protection is given to the user or consumer of a product. Further, Michigan products liability law acknowledges and accommodates the basic tort product liability purpose of spreading the risks of using an unreasonably dangerous or

negligently designed product on the designer/manufacturer. Thus the basic policies of product liability law would not be frustrated or offended by the application of Michigan law to this case.

(f) *Certainty, predictability, and uniformity of result:*

To the extent that this factor is applicable to a personal injury suit for product liability, the consistent application of the law of the state of its principal place of business against a manufacturer increases the certainty and predictability to the manufacturer of what legal standards he must meed and what his potential liability is if he fails to meet those standards. Also, the consistent application of the law of the state of the manufacturer's principal place of business would result in enhanced uniformity of result in such cases against the manufacturers of that state and among the various users injured by an unreasonably dangerous or defective product throughout the nation.

(g) *Ease of determination and application of law to be applied:*

The law of Michigan pertaining to product liability cases is readily available and easily ascertained. This federal district court which routinely exercises diversity jurisdiction is more than competent to apply the law of Michigan to a case being tried before it.

IV.

It is Proper To Apply the Law of the State of Manufacturer as "Where the Alleged Negligence Occurred," in Cases Against Manufacturers

Harville v. Anchor-Wate, 663 F.2d 598 (5th Cir. 1981) involved a personal injury suit by a plaintiff against a Texas designer and manufacturer of a pipe-coating machine. The Plaintiff was a resident of Louisiana at the time of the accident and was injured at a Louisiana plant owned by one of the Defendants. At the time suit was filed, Plaintiff resided in Arkansas. The defendant/owner of the machinery which injured the plaintiff was a Texas corporation; however, the Plaintiff had been injured at that some defendant's plant in Louisiana. The machinery had been designed and manufactured in Texas. The Fifth Circuit Court of Appeals determined that Louisiana law would apply to the negligence action between the plaintiff and the purchaser/owner of the machinery. However, Texas law was to be applied to the rest of the case; that is, to all causes of action against the Texas designer and the Texas manufacturer, including Plaintiff's claim against the manufacturer, the manufacturer's claim against the designer, and the manufacturers and owner's crossclaims against each other. *Also see, Moorehead v. Mitsibushi Aircraft International, Inc.*, 639 F.Supp. 385 (E.D.Tex. 1986) (accident occurred in Texas and Defendant manufacturer was a Texas corporation). Similarly, in *bruce v. Martin-Mareitta Corporation*, 544 F.2d 442, 445 (10th Cir. 1976), the court approved the application of Maryland law against a Defendant which had its principal place of business in Maryland and of Missouri law against a Defendant which had its principal place of business in Missouri, in a product liability lawsuit by Kansas and Oklahoma residents arising out of an airplane crash in Colorado. Plaintiffs alleged

defective design, manufacture, and maintenance of the airplane under theories of negligence, implied warranty, and strict liability in tort.

In *Bakunas v. Life Pack, Inc.*, 531 F.Supp. 89 (E.D.La. 1982), the court concluded that Louisiana law should apply to a product liability lawsuit by New Jersey residents against Defendant residing or incorporated in Louisiana and where the product was manufactured, in a lawsuit arising out of an accident in Kentucky.

In *Beaudreau v. Baughman*, 356 S.E.2d 907 (N.C.App. 1987), a Massachusetts plaintiff brought a product liability suit for negligent design of a chair against a North Carolina manufacturer and designer. The chair had been sold to its owner and plaintiff's host in Florida and the plaintiff was injured in Florida. However, the North Carolina Court noted that the alleged acts or omissions relating to the design of the chair took place in North Carolina. In applying the Restatement §§ 6 and 145 factors, the court noted that both defendants and the events giving rise to the cause of action had a significant relationship to North Carolina and, further, that by enactment of its statutes of repose, the legislature of that state had manifested a public policy of protecting North Carolina manufacturers and designers from stale claims. Therefore, the Court held that the law of North Carolina was applicable to the merits of Plaintiff's case.

V.

Conclusion

It is clear from the above facts that Texas has little interest in applying its law to the merits of this case and that the underlying policies of Texas tort law would not be in any

way frustrated by the application of another state's law. Further, analysis of the significant contacts in this case states that the State of Michigan has the most significant relationship to this case and has the greatest legitimate interest in having its product liability law applied to the Defendant. The application of Michigan law would not offend any policies of the State of New Jersey, inasmuch as Michigan law allows full compensation of a plaintiff who establishes liability. It has been held that domiciliary states of plaintiffs have no interest in imposing punitive damages on forum corporate defendants. Rather, the legitimate interests of the plaintiffs' states is limited to assuring the plaintiffs are adequately compensated. Once the Plaintiffs are made whole by recovery of compensatory damages, the interests of the Plaintiffs' domiciliary states are satisfied. *In re Air Crash Disaster Near Chicago, Etc., supra*, at 612-613. For these reasons, Defendant Fruehauf Corporation moves the Court to determine that the liability and damage issues of this case will be determined by the application of Michigan law.

Respectfully submitted,

By: /s/_____
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Attorney in Charge for Defendant
Fruehauf Corporation

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

STATEMENT OF OPPOSITION

Counsel for Fruehauf Corporation has conferred with counsel for Plaintiff regarding this Motion. Counsel for Plaintiff is opposed.

/s/ illegible
Of Royston, Rayzor, Vickery & Williams

CERTIFICATE OF SERVICE

I certify that on this 20th day of August, 1990, a true and correct copy of the foregoing Motion was served upon Plaintiff's attorney, Robert O'Conor, Jr., Esq., 1301 McKinney, Suite 3177, Houston, Texas 77010; Dow Chemical Company's attorney, Martin D. Beirne, Beirne, Maynard & Parsons, First Interstate Tower - Suite 2400, 1300 Post Oak Blvd., Houston, Texas 77056; and Intervenor's attorney, Charles Seymore, Neele & Seymore, 4635 Southwest Frwy., Suite 420, Houston, Texas 77027.

/s/ illegible
Of Royston, Rayzor, Vickery & Williams

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BERNARD E. HUDDY,	§	
Plaintiff	§	
	§	
VS.	§	C.A. NO. H-85-5522
	§	
FRUEHAUF CORPORATION,	§	
Defendant	§	

STIPULATION

All parties stipulate that neither the Plaintiff nor the Intervenor made any objection at trial to the Court's charge and instructions to the jury or to the form of Special Interrogatories to the jury, in view of the Court's order of January 25, 1991 granting Defendant's motion to apply Michigan law (docket number 122).

Respectfully submitted,

/s/

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Signed by permission by
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